IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

TUESDAY, THE 11TH SEPTEMBER 2007 / 20TH BHADRA 1929

WP(C).No. 27039 of 2007(R)

OS.649/2006 of I ADDL.SUB COURT,ERNAKULAM

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PETITIONERS:

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1. P.O.SAMSON,AGED 57 YEARS, S/O. LATE O.M.UMMAN, C.C.NO.42/266 DHANYA, PALARIVATTOM, P.O. ERNAKULAM 682017.

2. K.J.KURIOKOSE AGED 57,S/O. K.Z.JOSEPH,KURIYICKAL HOUSE, PADIVATTOM, KOCHI 682 024.

BY ADV. SRI.P.J.PHILIP

RESPONDENTS:

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1. K.A.MOHNDAS, AGED 47,S/O.ANIRUDHAN, KALLAYIL HOUSE, JANATHA ROAD,VYTTILA,KOCHI-19.

2. P.S.NAIR, AGED 54,S/O. DAMODHARAN PILLAI KALABHAVAN HOUSE, THADIYOOR PO, KURIYANOOR VILLAGE,THIRUVALLA TALUK, PATHANAMTHITTA DISTRICT,PRESENTLY RESIDING AT 45/'1892 E, LINK PARK ROAD,POTTAKUZHI, KOCHI-12.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 11/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N.Krishnan, J.

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W.P(C).No.27039 of 2007

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Dated this the 11th day of September, 2007.

JUDGMENT

This Writ Petition is filed seeking a direction to the court below to raise the maintainability of the suit as an issue and hear the same without further delay and to issue a writ of direction to the court below to hear and dispose of Ext.P2 application on merits. So far as Ext.P2 application is concerned, it is an application for injunction filed under Order 39 of Code of Civil Procedure.

2. I am informed and as seen from the records that a temporary injunction has been issued. Respondents had entered appearance and had filed counter. Order 39 Rule 3A casts a duty on the court to dispose of the injunction application within 30 days and it can be adjourned only for reasons to be recorded in writing. The application was filed in 2006 and I am told that it is

still kept pending. So there is some force in the contention and therefore I direct the learned First Additional Subordinate Judge, Ernakulam to dispose of Ext.P2 application as expeditiously as possible, within a time frame of 30 days from today.

3. So far as the second point is concerned, the learned counsel would contend that there must be a direction to raise the issue regarding the maintainability of the suit and it be heard as a preliminary issue. He would also submit that the question of maintainability is raised on the ground that time is the essence of the contract and since the time had expired, agreement to sell cannot be enforced. There are decisions and everything depends upon the facts and circumstances of each case to find out whether time is the essence of the contract in a case relating to immovable property. It may be a mixed question of fact and law. If it is a mixed question of fact and law, then the court may not be able to consider it as a preliminary issue in the light of Order 14 Rule 2 of Code of Civil Procedure. But it is for the court to consider the same. At any rate, the court is bound to raise the issue regarding the maintainability of the suit and it may be decided whether it is to be considered as a preliminary issue or it

has to be done only after evidence is let in being a mixed question of fact and law.

With this observation, the Writ Petition is disposed of.

M.N.Krishnan,
Judge.

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